

4
No. 1934

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE NORTHERN PACIFIC RAILWAY COMPANY
(a Corporation),

Plaintiff in Error,

vs.

JOHN MARINOVICH,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit
Court for the Western District of Wash-
ington, Western Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

NORTHERN PACIFIC RAILWAY COMPANY (a
Corporation),

Plaintiff in Error,

vs.

JOHN MARINOVICH,

Defendant in Error.

Stipulation [Under Rule 23].

It is hereby stipulated by the parties hereto that the Clerk of the Circuit Court of Appeals shall print the following parts, only, of the record which are deemed material to the hearing of the writ of error in this case, to wit:

Complaint;

Answer to Complaint;

Reply to Answer;

Judgment;

Assignment of Errors;

Bill of Exceptions;

Order Settling Bill of Exceptions; and this Stipulation;

That in printing the above portions of the record, the designation of the Court, title of the case, verifications and endorsements may be omitted, except on the first page.

GEO. T. REID,
J. W. QUICK, and
L. B. da PONTE,

Attorneys for Plff. in Error.

GORDON & ASKREN,
Attorneys for Deft. in Error.

[Endorsed]: No. 1934. In the United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Ry. Co., Pltff. in Error, vs. John Marinovich, Deft. in Error. Stipulation. Filed Jan. 3, 1911. F. D. Monckton, Clerk.

*In the Superior Court of the State of Washington,
for Pierce County.*

No. 29,771.

JOHN MARINOVICH,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a
Corporation),

Defendant.

Complaint.

Plaintiff above named complains of the defendant above named, and for cause of action herein alleges:

1.

That the Defendant, Northern Pacific Railway Company, is and at all times herein mentioned has been, a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, and as such owning and operating a railroad for freight and passengers through the town of McMillan, in Pierce County, State of Washington.

2.

That in the conduct of its said business and for the use and accommodation of its passengers and those desiring to become passengers upon its said railroad, said defendant, on May 12th, 1910, and for some time prior thereto, has maintained a station on or near its right of way in the said town of McMillan, Pierce County, Washington.

3.

That on May 12th, 1910, this plaintiff, desiring to

become a passenger upon the next train, southbound, operated by defendant through said town, went to said station at McMillan; that while so waiting for said train at said station, without any fault or negligence on his part, the defendant, through its officers, agents and employees, carelessly and negligently ran and operated a freight train loaded with logs, upon its track adjoining said station, and through its negligence in the operation of said train at an excessive rate of speed, and in the negligent manner the logs thereon were placed, one or several logs were thrown from said train against and upon said station in which said plaintiff was at said time waiting for said southbound train, nearly wrecking and demolishing said station; that said plaintiff was thereby hit by the said logs or the broken lumber in the said station, thereby causing two of his ribs to become fractured on the left side; his scalp to be wounded in two places over and under the right eye about two inches long, the fleshy part of right eye socket torn, contusion of the eye, his scalp at the back to be cut to the skull bone, about four inches long; both bones of his right leg fractured, and tongue nearly cut in two, his shoulder injured, and his right knee joint permanently injured, and causing severe internal injuries. That by reason of his injuries aforesaid plaintiff was rendered insensible for a considerable space of time, and has suffered intense pain on account of said injuries, and that he ever since has been and now is under a doctor's care, that he has been informed by his physician and believes that his injuries are permanent. That he will

be unable to work at manual labor in the future.

4.

That plaintiff is forty (40) years of age and for a number of years past has had steady employment in and around coke ovens at from \$3.50 to \$7.00 per diem.

5.

That by reason of said injuries, plaintiff has been damaged in the sum of Twenty Thousand and no/100 (\$20,000.00) Dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of Twenty Thousand & no/100 (\$20,000.00) Dollars, and for his costs and disbursements.

PETER DAVID,
C. L. WESTCOTT,

Attorneys for the Plaintiff.

[Verified and Endorsed.]

[Title of Court and Cause.]

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff, alleges as follows:

I.

For answer to paragraph I of said complaint, defendant admits that it is a corporation organized and existing under the laws of the State of Wisconsin and owns and operates a railroad for the carrying of freight and passengers in Pierce County, State of Washington.

II.

For answer to paragraph II of said complaint, defendant denies the allegations therein contained.

III.

For answer to paragraph III of said complaint, defendant denies that on the 12th day of May, 1910, the plaintiff desired to become a passenger on defendant's train, southbound, at McMillan, Washington; and denies that plaintiff was injured through the carelessness and negligence of the officers, agents and employees of this defendant; and denies that defendant ran and operated a freight train loaded with logs at an excessive rate of speed at McMillan, Washington; and denies that defendant had negligently loaded the logs on its cars.

Defendant further answering said paragraph, alleges that it has no knowledge or information concerning the nature and extent of plaintiff's alleged injuries, and therefore denies the same to the extent that plaintiff be required to make proof thereof.

IV.

For answer to paragraph IV of said complaint, defendant alleges that it has no knowledge or information concerning the facts therein alleged and therefore denies the same.

V.

For answer to paragraph V of said complaint, defendant denies the allegations therein contained.

Defendant for a further and affirmative defense to plaintiff's cause of action, alleges as follows:

I.

That on the 12th day of May, 1910, the plaintiff

was a trespasser upon either its freight train or upon its right of way and premises at McMillan, Washington, without right or authority, and without the knowledge, consent or acquiescence of the defendant, and at a time when there was no train upon which he could take passage as a passenger, and when there would be no such train for a period of about five hours after the time plaintiff is alleged to have been injured. That at the place where plaintiff is alleged to have been injured was an old abandoned and unused shed upon the right of way of the defendant, which shed was about one hundred (100) feet from the place and building occupied by the agent of this defendant where tickets were sold to persons desiring to become passengers on defendant's trains. That said plaintiff had not procured a ticket for the purpose of riding upon defendant's train, but was upon the premises of this defendant without right of authority and without its knowledge or consent, and not for the purpose of transacting business with the defendant, its agents, servants or employees, and not within a reasonable time prior to the arrival or departure of any passenger train on defendant's line of railway.

Wherefore, defendant prays that plaintiff take nothing by reason of his said action, and that defendant recover its costs and disbursements herein expended.

GEO. T. REID,

J. W. QUICK,

L. B. Da PONTE,

Attorneys for Defendant.

[Verified and Endorsed.]

[Title of Court and Cause.]

Reply.

Comes now the plaintiff and for reply to the further and affirmative defense in defendant's answer contained, admits, denies and alleges, as follows:

Denies that plaintiff was trespassing upon either its freight train or upon its right of way or premises at McMillan, Washington, or elsewhere.

Denies that he was there without the right or authority or without the knowledge, consent or acquiescence of the defendant.

Denies that there was no train upon which he could take passage as a passenger for a period of about five hours after the injury.

Denies all the allegations in said reply contained except as herein admitted.

Alleges that he has no knowledge or information sufficient to form a belief as to whether or not an agent of the defendant sold tickets for passengers on defendant's trains at a place about one hundred feet distant from said station, and therefore denies said allegation. Defendant admits that he had not procured a ticket at the time of the injury.

Wherefore, plaintiff prays as in his original complaint.

PETER DAVID,
C. L. WESTCOTT,

Attorneys for the Plaintiff.

[Verified and Endorsed.]

*In the Circuit Court of the United States, Western
District of Washington, Western Division.*

No. 1659.

JOHN MARINOVICH,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a
Corporation),

Defendant.

Judgment.

At the regular July, 1910, term of said Court.
Present: The Honorable GEORGE DONWORTH,
presiding Judge.

This cause was reached upon the calendar on the 20th day of October, 1910. The plaintiff appearing in person and by J. H. Easterday, R. L. Sherrill, David and Westcott, and Gordon and Askren, his attorneys, and defendant appearing by George T. Reid, J. W. Quick, and L. B. Da Ponte, its attorneys, both parties being ready for trial, a jury was duly impanelled and sworn to try the issues and the respective parties having introduced their evidence and rested, the arguments of counsel having been heard, the jury duly instructed by the Court, retired. And thereafter, on the 25th day of October, 1910, returned into court a verdict finding in favor of the plaintiff John Marinovich, and against the defendant, Northern Pacific Railway, in the sum of Three Thousand Dollars, which verdict was duly received and entered of record.

And thereafter, on the 7th day of November, 1910, said cause coming on to be heard upon the motion of the defendant for judgment notwithstanding said verdict, the Court having heard the argument of counsel, being fully advised, denies said motion, to which ruling the defendant excepts and its exception is allowed. And said cause coming still further on to be heard on defendant's motion for a new trial, the Court having heard the argument of counsel and being fully advised, overrules said motion, to which ruling defendant excepts and its exception is allowed.

NOW, THEREFORE, upon motion of counsel for the plaintiff, it is CONSIDERED, ORDERED AND ADJUDGED, that John Marinovich, plaintiff, do have and recover against the Northern Pacific Railway Company, a corporation, defendant, the sum of Three Thousand Dollars damages, together with ——— Dollars costs as taxed herein, amounting in the aggregate to the sum of ——— Dollars.

IT IS FURTHER ORDERED that defendant be allowed thirty days from the date hereof in which to prepare a Bill of Exceptions and perfect an appeal.

Done in open court, this 10th day of November, 1910.

GEORGE DONWORTH,
Judge.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Nov. 10, 1910. A. Reeves Ayres, Clerk. By Saml. D. Bridges, Deputy."

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered that on the 19th day of October, A. D. 1910, the above-entitled cause came on for trial in the above-entitled court, sitting at Tacoma, Washington, before the Honorable George Donworth, Judge presiding, and a jury.

M. J. Gordon, J. H. Easterday, Peter David and Charles L. Westcott appearing as attorneys for the plaintiff, and Geo. T. Reid and J. W. Quick appearing as attorneys for the defendant.

Whereupon the following proceedings were had and done and testimony taken, to wit:

The panel of regular jurymen having been exhausted, when eleven members of the jury had been secured, it was stipulated and agreed between the parties, by their respective counsel, that the case should be tried by eleven jurymen, and the Court thereupon ordered that said cause proceed to trial before a jury composed of eleven jurymen.

[Testimony of R. C. Urie, for Plaintiff.]

R. C. URIE, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. GORDON.)

My name is R. C. Urie. I am forty-three years old and reside at Tacoma, Washington. I am a photographer by occupation and have followed that business for twenty-three years. My place of business

(Testimony of R. C. Urie.)

is located at Wilkeson, Washington, and on the 16th day of May, 1910, I took views of the remains of the station-house at McMillin, in this county, and made photographs marked Plaintiff's Exhibits "A" and "B," respectively, and they are correct representations of the premises. (Thereupon said photographs were received in evidence and marked Plaintiff's Exhibits "A" and "B.")

Cross-examination.

(By Mr. QUICK.)

Exhibit "A" shows the track looking east toward Orting, and Exhibit "B" shows the track looking west toward Tacoma.

[Testimony of G. W. Hale, for Plaintiff.]

G. W. HALE, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I am seventeen years old and live with my parents at McMillin. My parents keep a store at McMillin and are in the general merchandise business. I was in McMillin the 12th day of last May, when the station-house was knocked down by logs from the logging-train. I did not see the accident, as I was down on the school grounds, about a block and a half from the station-house, at the time. I heard the noise of the logs and train and with the rest of the children ran up there. When I got there I found a lot of logs on the ground and that the station-house had been torn up by the logs, and I saw the plaintiff

(Testimony of G. W. Hale.)

under the depot. He was on his back and the depot was lying on his chest and I think a log was over his legs. I could not tell whether he was conscious or unconscious, but I know he kept up kind of a talk, but I could not understand it; just hollering. I ran across the track and got a crow-bar from the store and helped to get him out. His face was hurt; his right eye was cut; his face was covered with blood and I could not see what other injuries he had received. My father's store is about 110 feet from this station-house. The station had not been there very long before the accident, but I cannot say just how long it had been there. It was on the right-hand side of the track going toward Orting, and it was just a small frame building with one end closed and used as a warehouse for freight and the other end was used as a waiting-room. This waiting-room had an opening on the side next to the track like a place built for a door, but no door was put in and there were three benches inside which were used for seats. One of the benches was against the wall along the side and the other two against the end walls. This building was about 8 or 9 feet from the track and on each end was painted the word "McMillin."

Cross-examination.

(By Mr. QUICK.)

The station building is located on the railway company's right of way and about 8 or 9 feet back from the nearest rail. It is just a one-story affair, in one end of which they put freight and the other end is a kind of a waiting-room. It was all boxed up with

(Testimony of G. W. Hale.)

the exception of a place left open in the side next to the track for a door, but no door has ever been put in. There were three benches, one across each end and one lengthwise in this waiting-room. There was no agent or person in charge of this building, and railway tickets are sold at our store. My mother is the agent of the company for the purpose of selling tickets and attending to matters of that character. Our store is about 110 feet from this little waiting-room. I was not present at the time of the accident and did not see it. I do not know how old my mother is, but she is somewhere up in the forties and she is the only lady that stays at our store. There is another store at McMillin kept by Mr. Ball, and his boy and sister work in his store. His sister is a young girl about 18 or 19 years old.

Redirect Examination.

(By Mr. GORDON.)

The train came to a stop after the accident, but I could not say how long the train was. I think the accident occurred about 12:30 or 12:45. I saw the train-men there. It was a freight-train with logs and coal, and I think some box cars. I did not notice just how many cars of logs there were, but I think there were four or five and they were in the front part of the train next to the engine. I think something like three logs came off the first car and all the logs came off the rest of them. The logs were scattered all around the building and on both sides of the track. There seemed to be about 40 logs. The accident made a noise like a *crash*, and when I heard

(Testimony of G. W. Hale.)

it I started and went down there. I think the train stopped with the engine about the cattle-guards, not over 300 feet, I would think, from where the station was. The track at this place was straight for about an eighth of a mile from the direction the train was coming.

Recross-examination.

(By Mr. QUICK.)

There were no passenger coaches on this train, and the next passenger train was due through there at about 6:35 in the evening, and this accident occurred about a quarter to one o'clock.

[Testimony of Dr. S. D. Barry, for Plaintiff.]

Dr. S. D. BARRY, being called on behalf of the plaintiff and duly sworn, testified as follows:

I am a physician and surgeon and located at Puyallup, Washington. I have been practicing medicine and surgery since 1905, and am registered in this state. I am a graduate of a medical school in Illinois. I am one of the attending physicians and surgeons at the hospital in Puyallup and was there last May and attended the plaintiff when he was brought to the hospital. He was brought to the hospital about 2 o'clock P. M. May 12, but I first saw him on a Northern Pacific freight train coming in from the east. The distance from McMillin to Puyallup is about 3 miles. When I first saw the plaintiff he was unconscious, and on examination I found that there was a fracture at the upper end of the right leg just below the knee, a fracture of both bones. There was also a fracture of the third and

(Testimony of Dr. S. D. Barry.)

fourth ribs on the right side, and there was a "V"-shaped *insition* just over the eye and another on the side of the eye very near the ball, but not touching the eyeball, and there was a circular wound in the back of the skull about four inches in diameter. They were only scalp wounds, not into the skull, but down to it; the scalp was turned back and there was considerable dirt under the flap. It was easily replaced and no tissue was lost. There was a small incised wound of the mouth and one of the tongue. These are all the injuries I remember. He was under my care the entire time he was in the hospital, which was about six weeks. The injury to the leg was necessarily very painful and the others were also for several days. There was considerable congestion of the eye for two or three weeks, which was rather painful. As soon as he was able to move he was taken from the hospital, but I do not know who has been attending him since. I examined him in the office of Dr. E. M. Brown in Tacoma some two or three weeks after he left the hospital, and that was the last time I saw him.

Cross-examination.

(By Mr. QUICK.)

When he left the hospital he was on crutches. His right leg had not recovered sufficiently to *unable* him to walk on it, other than that his condition was fair. The wounds in the head had healed and there was no evidence that I could determine at that time of any permanent injury to the head. The right leg was stiff at the knee; there was no movement there. The

(Testimony of Dr. S. D. Barry.)

fracture was in the joint and in such cases it is usually permanent. At the time I examined him in the office of Dr. Brown, he was complaining of the lack of the use of both hands, which was determined at the time to be neuritis, due to pressure on the nerves under the arms from wearing his crutches. The right limb had not improved and he had no use of it.

[Testimony of Henry Ball, for Plaintiff.]

HENRY BALL, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I live at McMillin and am a merchant, having a store at that place. The little station-house or waiting-room that was knocked down and demolished last May was put in some time last spring; I think in February or March. It was what is commonly known as a blind station. There was a little place on one end for freight and on the other end was a small place, an open shed, with a bench around it for the convenience of people. There are a good many of them throughout the country. I circulated a petition to the railroad company to have them provide this waiting-room, and I think it was put in in February or March. It was about 8 or 10 feet from the track and had the name of the station lettered on each end of it.

Cross-examination.

(By Mr. QUICK.)

This building was located on the right of way and

(Testimony of Henry Ball.)

was about such an affair as you see along the tracks of the street railway. Before it was built the people had no place to get in out of the rain, and for that reason I petitioned the railroad company to construct it. McMillin is a small place with only two stores. People come to the stores and then cross over the track to this building, and before it was put up the women had to stand in the rain, and our idea was to have a place to step in out of the rain when waiting for the train. There was never any agent there, and the Hale store had the agency for selling tickets and has had for 22 years, to my knowledge. Tickets are sold at the Hale store and the store is always open from about a quarter to seven in the morning until about half-past seven in the evening, which is after the evening train. There were two passenger trains each way; one goes down in the morning and is due there about eight, and one goes up at about a quarter to ten, and then in the evening there is a train comes up, leaving Tacoma about five and due at McMillin at 5:36, and another comes down from Buckley, which is due there about half-past six or a quarter to seven; I don't remember the exact schedule. There was no passenger train through there after ten o'clock in the morning until 5:30 in the evening.

Redirect Examination.

(By Mr. GORDON.)

During the twenty-four hours there were four passenger trains, two each way, on this line, and perhaps three local freights and occasionally a through

(Testimony of Henry Ball.)

freight. Of course they are not a regular thing. As to the freight-trains, I cannot say, as I am not well posted. They sometimes run extras or something of that kind, but there were only the four passenger trains, two each way. This logging train was going through at the time of the accident and was not a train scheduled to stop at McMillin. It is not a fact that passengers frequently, with or without a permit, board the freight trains at McMillin, to my knowledge.

[Testimony of Dr. G. G. R. Kunz, for Plaintiff.]

Dr. G. G. R. KUNZ, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I reside in Tacoma, Washington, and am a duly licensed physician and surgeon, and have been practicing my profession for twelve years, the past four years being here in Tacoma.

I saw the plaintiff in the hospital at Puyallup on May 14 of the present year, and made an examination of him. His right leg was in a dressing. He had suffered a fracture of the two bones at a point below the knee; he also had severe laceration over the upper and outside of the right eye, which had been sowed and attended to by Dr. Barry. He also had an injury on the back of his head and severe laceration, and he was also injured in the right side of the chest. There were possibly two ribs broken. His face, of course, was badly swollen and the eye was closed; he was suffering a great deal of pain.

(Testimony of Dr. G. G. R. Kunz.)

I saw him again June 3d. He was then improving and had improved considerably. The wounds in his face and head had improved. The leg was very much swollen, but was in proper position and he was getting on to as good a convalescence as could be expected. That was the last time I saw him until today in my office, when I was requested to again examine him. The right leg shows a shortening of an inch. At the seat of the former injury it is enlarged, the circumference being an inch and a half larger than that of the other limb. The leg is somewhat swollen; that is the lower part of it below the fracture, which is most always the case in injuries of that kind. The injuries to the head have healed. The scars are still present, of course. He complains of lack of sensation in his arms, fingers and chest; a lack of strength. The muscles have decreased in size somewhat and he does not have the strength that a man of his ability should have in those muscles. There seems to be some thickening at the point of fracture, and he complains of slight pain upon pressure there. He will always have a short leg, and I believe he will always have some impairment or impediment in the use of each. It will get stronger in time, but may never be quite as strong as it formerly was, and he will suffer from it for some time, and the chances are there will be more or less incapacity. The arms and hands will slowly improve, but I cannot say with any degree of positiveness. I do not know as I could expect a permanent ultimate recovery. The chances are that he will make some improvement

(Testimony of Dr. G. G. R. Kunz.)

at least, but whether he will fully recover his strength I cannot say at the present time.

[Testimony of John Marinovich, on His Own Behalf.]

JOHN MARINOVICH, the plaintiff, being called and sworn in his own behalf, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I am forty years old and was born in Austria. I came to the United States first in 1894; sixteen years ago. I am married and have a wife living in the old country. In the month of May last I was working at Fairfax, ten miles from Wilkeson, for the Fairfax Company and the Tacoma Smelter. I was working as a coke heaver, forking coke into a box-car. I have been doing this for over eight or nine years. I have lived in the State of Washington since 1896, but I went away a couple of times. I took out my first citizenship papers in South Dakota but have never taken out my final papers. I was earning \$3.50 a day before I got hurt. On the morning of the 12th of May I left Wilkeson and went on the train to South Prairie and from there I walked down to McMillan, so that I could see the country, as I was looking for a piece of land. I got to McMillan about noon and went inside the depot there to wait for a train to South Prairie. It was the first time I had ever been there and I did not know about the trains going through there. I wanted to take the first train to South Prairie to see Mr. Joe

(Testimony of John Marinovich.)

Lee. I would buy a ticket or pay on the car, but there was no agent there. I had money to pay my way. I sat down about ten minutes inside the depot then along came a train, run as fast as a passenger train, and logs fell off and smashed the depot and myself. I could not help myself at all; broke my leg, and hurt my shoulder, head and face, and my mouth; my tongue pretty near bit off. I was taken to Puyallup and was in the hospital there fifty-three days and was treated by Dr. Barry and Dr. Kunz. At the time I was hurt I weighed 187 pounds and had never been hurt before.

Cross-examination.

(By Mr. QUICK.)

Q. Where were you on the morning you got hurt, —early in the morning?

A. I was coming from Wilkeson.

Q. Had you stayed in Wilkeson that night?

A. Yes, and worked one day in Wilkeson.

Q. What time did you leave Wilkeson that morning?

A. About twenty minutes to seven.

Q. And where did you go to?

A. To South Prairie.

Q. How did you go to South Prairie?

A. On the train to South Prairie.

Q. And how long did you stay at South Prairie?

A. About two minutes.

Q. Then where did you go?

A. To Joe Lee's Sawmill, and Broomfield, and asked a couple of men loading a car, if Joe Lee at home, and they said no, he was at the logging camp;

(Testimony of John Marinovich.)

and I go to Crocker, and to Orting and McMillan.

Q. Did you walk all the way? A. Yes.

Q. On the railroad track?

A. Yes, and on the wagon road too.

Q. How much of the distance did you walk on the railroad track? A. Not far.

Q. Well, how far; did you walk from South Prairie to Crocker on the railroad? A. Yes.

Q. And then from Crocker to Orting, did you walk on the railroad?

A. Some on the railroad and some on the wagon road.

Q. And from Orting to McMillan?

A. Walked some on the wagon road.

Q. But most of the way on the railroad, didn't you, or part of the way?

A. Some parts on the wagon road and some parts on the railroad.

Q. About what time did you get to McMillan?

A. Before noon.

Q. What did you go to McMillan for?

A. Looking to buy a piece of land.

Q. Had anybody told you of a piece of land there at McMillan?

A. I came to look out what kind of land to buy.

Q. Did you talk to anybody about land on your way down?

A. No, no; just one man; he said that nobody was at home.

Q. Did you talk to anybody at Orting?

A. No.

(Testimony of John Marinovich.)

Q. Did you talk to anybody at Crocker?

A. I never saw anybody there, only the section-man.

Q. Did you talk to anybody at McMillan?

A. Nobody there, only one store.

Q. Did you go to the store?

A. Yes, and bought lunch too.

Q. Who did you see there? A. One girl.

Q. That is the girl in the store you bought the lunch from? A. Yes.

Q. Did you ask her anything about the trains?

A. I asked her what time the train, and sometimes it comes along and sometimes not. She said it comes along sometimes.

Q. That was all she said? A. Yes, sir.

Q. She did not tell you when it would come?

A. No; did not say at all what time it come.

Q. She just said it would come along some time.

A. Yes.

Q. What did you do with your lunch?

A. I ate him.

Q. You took it down to the depot and ate it?

A. I ate it by the corner of the fence, by the side-track, and went to the depot five or six minutes.

Q. Did you talk with anybody else except the girl? A. No; nobody else.

Q. Did you see any man up there and talk with him? A. No.

Mr. QUICK.—Will Mr. Ohls please come forward? (Gentleman comes forward.)

Q. Did you see this man there at McMillan and talk to him?

(Testimony of John Marinovich.)

A. I don't know now; that is a long time.

Q. Didn't you talk to him in the Austrian language?
A. No, sir.

Q. Didn't talk to him there?
A. No, sir.

Q. Didn't you borrow ten cents from him to get lunch with?

A. No, sir. Had plenty of money in my pocket.

Q. You didn't get ten cents from this gentleman to buy lunch with?

A. No, sir; if I did that, you may take my head off.

Q. Didn't he want to hire you to work for him?

A. No, sir.

Q. Didn't he tell you he would give you a couple days work?

A. Not to me; I did not see him.

Q. Never saw him?

A. No, sir; never saw that man before now.

Q. How many of the stores were you in at McMillan?
A. Two stores.

Q. Were you in both of them?
A. No.

Q. Just to one store where the girl was?

A. Yes.

Q. Did you ask to buy a railroad ticket of anybody?
A. No.

Q. You did not inquire about a railroad ticket?

A. Nobody at the depot.

Q. Did you ask for the agent?

A. No agent there.

Q. Did you ask this girl where you could find the agent?

(Testimony of John Marinovich.)

A. There was no agent; the depot was over on the other side of the County Road. The sign was there on the station; nobody there.

Q. Did you ask the girl where the agent was?

A. No agent there.

Q. You just asked her when the train would come?
A. Yes, that is all.

Q. Can you remember just what you did ask her?

A. I asked her for lunch, and I said what time come the train to South Prairie, and she said, "I don't know; sometimes come, and the train sometimes no come."

Q. Sometimes it comes on time and sometimes it don't?

A. Sometimes come a train and sometimes don't.

Q. Where were you when this log train came?

A. I sat down in the depot; was going in the door.

Q. Did you see the train coming?

A. Yes, and the logs fell off right away.

Q. Did you see the train coming down the track before it got there?

A. I saw it just coming close to the door.

Q. Had you been sitting in the depot before?

A. About five minutes, that is all.

Q. Did you go out of the door as the train came up?
A. No; inside.

Q. You were sitting there on the bench when the log struck you?
A. Yes.

Q. If you were waiting for the train and heard one coming, why didn't you go out to see what train it was?

(Testimony of John Marinovich.)

A. The log fell off and go against the door.

Q. The logs didn't fall off until after the engine passed the depot, did they, and part of the train?

A. I no see myself.

Q. You didn't see it at all? A. No.

Q. You were there waiting for the train?

A. Yes.

Q. And heard this train coming?

A. It was coming.

Q. But you did not go out to see if it was the train for you?

A. It just come close to the door, never whistled or anything.

Redirect Examination.

(By Mr. GORDON.)

Q. How much money and what property do you own?

Mr. QUICK.—That is objected to as immaterial.

The COURT.—Objection overruled; exception allowed.

Q. What property do you own?

A. About three or four hundred dollars.

Q. In money? A. I have some money too.

Q. How much money?

A. I don't know now. I had pretty good-sized money home.

Q. Did you own property in the old country?

A. I have some.

Q. What? A. A farm.

Q. Where your wife lives? A. Yes.

Q. How much money do you send back home, if

(Testimony of John Marinovich.)

any, in the last year?

Mr. QUICK.—That is objected to as immaterial.

The COURT.—Objection overruled, exception allowed.

Q. How much?

A. No send any last year.

Q. What did you do with your money last year?

A. Spent it for myself; no work last year much; I was laid off; they shut down fifty or sixty ovens there.

Q. How much money did you have at the time you were injured, in your pocket?

A. About \$25.00. A ten dollar bill pinned in the pocket, in the handkerchief, and in the side pocket in front; and \$5.00, two gold pieces, ten dollars gold, in the front pocket, and over \$5.00 silver.

Q. Where did you get that money and when?

A. I saw some man in Wilkeson. I have two men who gave me \$10.00 gold for the bill.

Q. Are you a drinking man?

A. No, sir. I drink sometimes a couple of glasses; that is all.

Q. Had you been drinking that day?

A. Just one glass; that is all.

Q. What? A. Beer.

Q. Where? A. St South Prairie.

Q. Did you ever get drunk?

A. No, sir; never seen myself drunk. Joe Lee and Broomfield and Guss saw me, and Jack Laughlin.

Q. How do you send money home when you send

(Testimony of John Marinovich.)

it? A. Through the postoffice.

Q. Have you the receipts for any money?

A. Yes.

Q. Where are they? A. In my pocket.

Q. Here? A. Yes, sir.

Mr. QUICK.—I would object to any offer of that as incompetent and immaterial.

The COURT.—Objection overruled; exception allowed.

Mr. GORDON.—I show you Plaintiff's Exhibits "D," "E" and "F"; did you ever see these before?

A. Yes.

Q. Where did you get them; did you ever have them? A. I got them at Carbonado.

Q. Did you pay money for these?

A. Sure.

Q. Where were you sending the money represented by them? A. Home.

Q. To your wife?

A. Yes; to my partner, and he gave to my wife.

Mr. GORDON.—We make the offer of these Exhibits "D," "E" and "F" as evidence.

Mr. QUICK.—Objected to as immaterial.

The COURT.—Objection overruled; exception allowed.

Whereupon said receipts were received in evidence and marked as Plaintiff's Exhibits "D," "E" and "F" respectively.

Recross-examination.

(By Mr. QUICK.)

Q. You intended to walk back to Orting and take

(Testimony of John Marinovich.)

the train there? A. No, sir.

Q. Do you remember the claim agent of the railroad company seeing you while you were in the hospital at Puyallup?

A. I don't know at that time what you were talking; I could not talk myself.

Q. Do you remember this man here? (Refers to Mr. J. E. Newton.)

A. I don't know him.

Q. Did you see him in the hospital while you were there?

A. Lots of men come in the hospital all the time.

Q. Oh, yes, lots of lawyers. But did you see the claim agent?

A. Some men were coming, I don't know.

Q. You don't know whether you saw this man or not?

A. You see my eye was closed up; I had only my left eye. Men came just like him.

Q. Do you remember the nurse who waited on you? A. I cannot tell the name.

Q. Do you remember the nurse who waited on you while in the hospital?

A. I don't know for that.

Q. Didn't you tell this man, the claim agent here, and the nurse, that you were going to walk back to Orting, and take the train from Orting?

A. I could not walk when the log killed me.

Q. Didn't you tell him you intended to walk back to Orting from McMillan, and take the train at Orting that evening?

(Testimony of John Marinovich.)

A. I don't know; not myself talking that.

Q. Did you tell this man that, and the nurse?

A. No, sir, I was sick; I did not know what it was you were talking about.

(Witness excused.)

[Testimony of Arthur Tucker, for Plaintiff.]

ARTHUR TUCKER, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I live at Wilkeson and am foreman of the coke ovens for the Wilkeson Coal & Coke Company. The plaintiff worked for me about two years ago for about three or four months and then came back and worked another time; I do not remember how long. He was a good worker and his wages generally averaged about \$3.00 a day.

[Testimony of Charles Broomfield, for Plaintiff.]

CHARLES BROOMFIELD, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I reside at South Prairie and have been in the saw-mill business lately. Previous to that I was a foreman for the Wilkeson Coal & Coke Company at Wilkeson and had charge of the bunkers. The plaintiff worked for me forking coke into the box-cars. His work was contract work and some days he would make \$2.50 and sometimes perhaps close to \$4.00.

(Testimony of Charles Broomfield.)

Cross-examination.

(By Mr. QUICK.)

I think it is about seven miles from South Prairie to Orting and about the same distance from Orting to McMillin.

[Testimony of Pascoe Boskovich, for Plaintiff.]

PASCOE BOSKOVICH, being called and sworn on behalf of the plaintiff, testified as follows, through the interpreter, Prosper Jurich.

Direct Examination.

(By Mr. GORDON.)

I live at Wilkeson and have lived there seven years. I have known the plaintiff for a long time; I knew him in the old country and also here in America. I saw him about five o'clock in the evening the day before he was hurt. He was at Wilkeson and I gave the driver, George Morris, a \$10.00 bill and the plaintiff gave Morris \$10.00 in gold for it. He wanted the paper money so that it would be easier to carry along with him. I saw that he had more money in his handkerchief, but I do not know how much.

[Testimony of A. R. Kalles, for Plaintiff.]

A. R. KALLES, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I am twenty-two years old and have lived at McMillin for the last seventeen or eighteen years. I was at McMillin last May when the station was knocked down by logs falling from the train. I was

(Testimony of A. R. Kalles.)

about two hundred feet south of the track at the time. The top log rolled off the front car. The front end of the log struck the ground and the other end remained on the car and pushed the logs off the other cars and three big logs hit the depot. When I got there one log was laying on the legs of the plaintiff and the building was resting on his breast. The building after it was knocked down looked just as shown in plaintiff's Exhibits "A" and "B." The building was about 12x18 feet and about twelve feet on the north end was for freight and the south end was used for a waiting-room and had three benches in it and an opening on the side next to the track. There was no platform in front of it, but there was two six by twelves with the gravel banked up between them. The word "McMillin" was painted on each end of the building. I helped take the plaintiff out and he was taken away in the caboose in the direction of Puyallup, and that is the last I saw of him.

Cross-examination.

(By Mr. QUICK.)

The train was coming from the east toward Tacoma and the engine had passed the depot before the logs rolled off the car. The track there is straight and level.

**[Testimony of John Marinovich, on His Own Behalf
(Recalled).]**

JOHN MARINOVICH, the plaintiff, being recalled, testified as follows:

Redirect Examination.

(By Mr. GORDON.)

Q. John, can you read English? A. No.

Q. Did you lose any papers in a fire, and if so when and where?

A. I lost some in a boarding-house in California.

Q. How long ago? A. Last year.

Q. What kind of papers?

Mr. QUICK.—We object to this.

The COURT.—Objection overruled; exception allowed.

A. Money order for postoffice papers, for the old country.

Mr. GORDON.—I want to show receipts for money forwarded by postoffice orders, of later dates, than those already offered, were burned, with his naturalization papers.

Mr. QUICK.—We object as immaterial and incompetent.

The COURT.—Objection overruled; exception allowed.

A. They were postoffice money orders.

Recross-examination.

(By Mr. QUICK.)

Q. You say you cannot read? A. No, sir.

Q. Can you write?

(Testimony of John Marinovich.)

A. No, never was in school myself.

Q. Do you remember while you were in the hospital at Puyallup and on or about the 17th or 18th day of May, that Mr. Newton, the gentleman who was standing here yesterday, was there talking with you; do you remember him writing on a paper like this?

A. I couldn't do it, no, sir.

Q. Do you remember Miss LePlante, the nurse sitting back there? A. Yes, sir.

Q. Was she there at the time the paper like this was written?

A. I saw a man looking, and not looking at me.

Q. But do you remember her being present when a paper like this was written out by Mr. Newton?

A. I saw some paper.

Q. And didn't you ask her to sign the paper after Mr. Newton had read it over to you?

A. Yes, he said, "Sign"; I could not read.

Q. And didn't you tell Mr. Newton and Miss LePlante that you were going to walk back to Orting, and take the train from Orting? A. No, sir.

Q. You did not tell that?

A. Well, I don't know; I be pretty sick; I don't know what I talked myself at that time.

Q. You claim you don't know what you said at that time?

A. Sure; I was pretty sick myself.

(Witness excused.)

[Testimony of Dr. E. M. Brown, for Plaintiff.]

Dr. E. M. BROWN, being called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GORDON.)

I am a physician and surgeon; been practicing my profession since the summer of 1879, and since 1885 in Tacoma. I examined the plaintiff first at my office about two months ago and again to-day. I found that he had trouble in his right leg, indicating a fracture.

The fracture was in the upper part of the leg, that is of that part below the knee. Whether there was more than two fractures I could not tell from the examination, as he was swollen, so that he may have had what we call comminuted fracture, that is several fractures, or only a fracture of each bone. The leg was shortened between the knee and the ankle, about an inch, and it was bowed out, so that it threw the center of the weight of the body on the outer side of the center of the foot, tipping the foot out which I consider in his case, at that time and to-day, both, his chief injury. The shortening making it necessary for him to limp more or less, but the weight of the body being sent down to the ground through the outer part of the foot instead of over the true center arch, and to-day in measuring that, I find that the outer malleolus or the tip of the ankle bone, is a half an inch lower than it should be, but that half inch is in addition to the inch of shortening that I spoke of before. There is about an inch of shortening be-

(Testimony of Dr. E. M. Brown.)

tween the upper and lower end of the leg bones, and then the outer bone on account of the canting of the foot out, similar to what takes place in a flat foot, when the weight is more on the outer side, there is a lowering there of about a half an inch. So that when he stands up the lower ankle bone is nearly an inch lower, nearer the ground, than it was a few months ago.

There was a difference in the size of the leg, on account of the swelling; there is a slight difference in the size of the leg on that account.

Approximately an inch. The injured leg below the knee is swollen; while the right leg above the knee, that is, the injured leg above the knee, is about the same amount smaller, that is about an inch, over the thigh muscle, either from nonuse or possible injury to the nerve.

His arms seem to be impaired in their use. The muscles of the arm are small for a laboring man, but I cannot say that there is much difference between the two arms in size, measuring around the upper part. In moving the arms he does it with a good deal of mental effort. That is, you put him through certain motions and have him move his arms in a certain way, and he does it easier after a little. And you make a little variation in the movement and it takes a long time for him to adjust himself to it. Whether that is from injury to the origin of the nerves in the back of the neck, or merely injury coincident to the injury as a knock on the back of the head, I cannot tell. Possibly there may be more or

(Testimony of Dr. E. M. Brown.)

less trouble from the pressure of the crutches.

There are indications of a cut in the scalp, in the back of the head, and some marks in the front part, but I didn't take any note of those. I only had a few minutes, and did not locate them.

I could not at this stage give a prognosis. He may be a great deal better in a year or two. He will always have shortening of the leg, and the tipping out of the foot, so that I would expect him to have at least a bad ankle. So far as the fracture of the leg, the upper part of the leg, that is less dangerous trouble than the ankle. It is on account of the false bearing throwing the weight of the body in the wrong direction, and the trouble he will have from the limb interfering with work, will always be just the same as it is now.

As to his arms, it is too soon to give any opinion. That all may pass away as he gets more used to crutches, or can throw them away.

The chief difference that I remember aside from the swelling and about the ribs,—I don't remember what that was, but the appearance seems to be less. The ankle is more out of shape than then. The swelling in the leg is perhaps better, and the wasting of the leg above the knee is more evident. That is, there was not the difference then between the two legs above the knee that there is now.

(Plaintiff rests.)

Defendant's Motion for a Nonsuit, etc.

Mr. QUICK.—The defendant at this time moves the Court to discharge the jury and grant a nonsuit

dismissing this cause at the cost of the plaintiff, for the reason that the evidence fails to prove a cause of action on behalf of the plaintiff, and for the further reason that the evidence affirmatively shows that the plaintiff was not a passenger at the time he was injured and is not entitled to recover.

Which motion, after being argued by counsel, was by the Court denied and the defendant allowed an exception to the ruling of the Court.

Defense.

[Testimony of J. E. Newton, for Defendant.]

J. E. NEWTON, being called and sworn as a witness in behalf of the defendant, testified as follows:

I am claim agent for the Northern Pacific Railway Company and have held that position for the past eleven years. I called on the plaintiff twice while he was in the hospital at Puyallup. The first time was within a day or two after the accident and the second visit was about two weeks later, as I remember. I think the dates were Monday the 16th of May and Saturday the 21st of May that I saw him. At the first visit Dr. Barry and the nurse, Miss LaPlante, were present and on the second visit Miss LaPlante was present. At the time of the second visit I talked with the plaintiff and he said that he was going to walk back to Orting from McMillin and take the train at Orting. At the time I talked with him he talked well, spoke and understood English well and seemed to be in normal condition and at ease.

(Testimony of J. E. Newton.)

Cross-examination.

(By Mr. GORDON.)

I had this conversation with the plaintiff at the time of my second visit on Saturday the 21st of May. We talked about the accident and I took his statement in writing as to the way the accident occurred. I was with him perhaps half an hour in the sick-room at the hotel. I made the second visit at the request of Dr. Barry.

“Q. Did you prepare a statement and ask him to sign it? A. I wrote the statement; yes, sir.

Q. Did he sign it?

A. I don't think he did. I don't think he signed it.

Q. In that statement he is represented as saying that he intended to walk back from McMillin to Ort-ing? A. That is what he said.

Q. That is in the statement?

A. That is to the best of my recollection.

Q. How long were you with him on the occasion of the first visit?

A. Not to exceed five minutes.”

[Testimony of Miss LaPlante, for Defendant.]

Miss LAPLANTE, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I was a nurse in the hospital at Puyallup at the time the plaintiff was brought to the hospital and I waited on him while he was there. I remember the

(Testimony of Miss LaPlante.)

occasion of Mr. Newton, the claim agent, being there at the hospital, and he called me into the room where the plaintiff was and he had a written statement prepared at the time I went in. He then read the statement over to the plaintiff and asked questions about it and he asked the plaintiff if he was going to walk back to Orting and he said he was. I heard the statement read over to the plaintiff by Mr. Newton and plaintiff affirmed it. (Handing witness paper.) This is the written statement and this is my signature at the bottom. I signed it as a witness. The plaintiff requested me to do so. I did that after Mr. Newton had read it to the plaintiff and the plaintiff said it was correct.

(Paper identified by witness introduced in evidence as Defendant's Exhibit #1.)

Q. "I will ask you if you remember Mr. Newton reading to him the following from this statement: 'It was my intention to walk back to Orting to get my dinner—(Interrupted by Mr. Gordon.)

We object to this for the reason that the witness stated she heard the paper read and heard him assent to it and that she signed it as a witness at his request.

The COURT.—Objection overruled.

A. Yes, sir, he pointed it out to me and told me to take notice of it; that is one statement that he wanted to make clear.' "

The plaintiff was in an apparently normal mental condition at the time and had been so ever since he came out from the anaesthetic. I saw the plaintiff first probably an hour and a half after he was

(Testimony of Miss LaPlante.)

brought to the hospital. Mr. Bair and I examined his clothing and I went through the pockets to see if we could find his name and what effects he had on him. I found a paper giving his name, some matches, a handkerchief or two but no money. This is the paper I found in his clothing with his name on it. (Paper marked Defendant's Exhibit #2.)

Cross-examination.

(By Mr. GORDON.)

This paper was found in a pocket in his coat. He was able to talk very well right after he came out of the anaesthetic, but he does not talk very good English, but I could understand him very well by listening closely.

“Q. You were listening very closely to hear what the claim agent was saying to him and he to the claim agent? A. Yes, sir.

Q. Now, isn't it a fact that he could not understand long sentences and will say yes and no?

A. No. We would sometimes have to make things clear to him.

Q. Seemed to have considerable difficulty in understanding a long sentence?

A. Unless it was plain to him.

Q. And haven't you frequently known him to say yes when he intended no, and you knew he intended no? A. No, I don't know as I have.”

The plaintiff was brought to the hospital some time in the afternoon and about an hour before I saw him. He was under the care of Dr. Karshner and Dr. Barry. All classes of patients are treated at the

(Testimony of Miss LaPlante.)

hospital and sometimes the Northern Pacific Railway sends patients there in case of an accident of this kind, but the railway company has nothing to do with the hospital. I think plaintiff was in the hospital about three months and for the first week he was there the doctors saw him every day and sometimes twice a day; he was in a very critical condition.

Redirect Examination.

(By Mr. QUICK.)

Q. "You say that when matters were explained to him he seemed to understand them thoroughly?

A. He did.

Q. What effort was made by Mr. Newton to explain to him this writing?

A. He made it clear if he did not understand it.

Q. Did he re-read any parts of it to him?

A. Yes, sir.

[Testimony of Gus Ohls, for Defendant.]

GUS OHLS, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I reside at McMillin and have resided there about three years. I was born in Germany and speak the German language. I can also speak the Austrian language but not very plain. I understand it better than I speak it. I remember the day the plaintiff was injured and I saw him before the accident, probably between eleven and twelve o'clock down by the depot. I talked with him there in regard to

(Testimony of Gus Ohls.)

employing him to work. The plaintiff said he did not want to work on a farm and was not looking for farm work. I do not recollect about giving him any money; as to that I would not say yes or no; there are so many going up and down the railroad I cannot swear to it. I think we were talking about money, but I don't remember. I don't think I gave him any. The plaintiff inquired about the camps, logging camps and also about coal camps and said he was pretty tired. He was talking about Crocker and Bloomfields and then he wanted to know about the St. Paul camps; they are big logging camps. I did not ask him if he was going out to them and he did not say; only said he was tired. When he left me he went over to Harry Ball's store. I saw him afterward sitting in the waiting-room; he was sitting like this (indicating), leaning his head on his hand. That was probably fifteen or twenty or twenty-five minutes before the log train came.

Cross-examination.

(By Mr. GORDON.)

I saw him go to Ball's store and he came out and went into this little waiting-room and had been there a few minutes when the train came along and the accident happened. He talked with me something about the price of land was an acre and I told him and he said it was too high, too much money.

[Testimony of C. P. Ronan, for Defendant.]

C. P. RONAN, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I am a conductor for the Northern Pacific Railway Company and have been employed by the defendant for seven years and a half. I was conductor in charge of the log train at the time the plaintiff was injured. I had been on that run about seven or eight days before the accident. I have handled log trains at different times and was a brakeman on a logging run for thirteen months. We picked up these cars of logs that were in the train at the time at Morris' Spur on the Crocker Branch. The logs are not loaded on the cars by the railroad company but are loaded by the Morris & Brew Logging Company. They are extensive shippers of logs and generally ship about four to six cars a day from that spur. I examined the cars before we took them out and they all appeared to be loaded in first class shape. When we find a car of logs that is not properly loaded, we set it back for reloading and require the shipper to reload it before we take it out. I examined the cars again at Orting and they were in an apparently good condition; they appeared to be all right. The two brakemen, Mr. Dougherty and Mr. Snyder, were with me. Logs that are properly loaded will sometimes slip from a train when it is in

(Testimony of C. P. Ronan.)

motion. I have seen that occur several times. This is sometimes caused by the irregular surface of the log and sometimes logs are spikey and the motion of the train will work the pins out. I did not see the accident, as I was in the last car making out my report at the time. This train was not scheduled to stop at McMillin and would not have stopped there except for the accident. The track at that place is straight and in good condition and the train was running about twelve or fifteen miles an hour. This is not a high or excessive rate of speed for that train. I examined the train after the accident, but could not determine just what caused the logs to go off. I could not see anything that would cause the accident. This train does not carry passengers and there would be no train through there that would carry passengers until the regular passenger train in the evening; I think about six o'clock.

Cross-examination.

(By Mr. GORDON.)

An occurrence like this for logs to slip from the train is rather unusual and does not often occur. There were five cars loaded with logs and they were together in the front end of the train. They had been picked up two miles east of Crocker on the Crocker Branch, which I think is about ten miles from McMillin. The train was brought to a stop after the accident and the plaintiff was brought in to Puyallup. There were no passengers on the train and it was the invariable custom not to carry passengers on that train and I never did. My brakemen

(Testimony of C. P. Ronan.)

were Snyder and Dougherty and they examined the cars at Orting also. It is three miles from Orting to McMillin and eight miles from Orting to South Prairie. There was no telegraph operator at McMillin.

[Testimony of E. Snyder, for Defendant.]

E. SNYDER, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I was one of the brakemen on this train at the time plaintiff was injured. I had been on that run but six or seven months and was familiar with the manner in which logs should be loaded for transportation by railroad. I was not present when the logs were picked up, but I examined the cars at Crocker and looked them over to see if they were properly loaded. I found them in good condition and they were loaded in the customary way for loading logs. I also examined the cars at Orting and found them in the same condition. Where we picked up the cars it is on a grade and we turned up the retainers that hold the pressure in the brake cylinders, and when we got to the foot of the hill at Crocker we turned down the retainers and looked the logs over to see that none of them were misplaced or worked loose, so by doing that I was familiar with the condition of the logs and had an opportunity to make a more careful inspection. At Orting we do switching and sometimes handle the cars a little roughly and I

(Testimony of E. Snyder.)

looked them over again to see if they were in good condition before leaving, and I did that on this trip and found them apparently all right.

Cross-examination.

(By Mr. GORDON.)

Q. "Whose duty is it to make this inspection at Crocker?

A. Any of the trainmen there who are employed on the train.

Q. And at Orting? A. The same.

Q. In other words, it is for the train crew to see that the loads are sufficiently safe?

A. That the logs are in a safe condition to handle.

Q. And properly protected in moving the train?

A. Yes.

Q. What was the number of your train?

A. I don't remember; I think it was extra—Well, I don't have the same engine every day.

Q. Was it a regular carded train or extra?

A. It was an extra train, and the extras are designated by the number of the engine.

Mr. QUICK.—Q. This train was not scheduled to stop at McMillin and did not carry passengers? A. No, sir.

(Witness excused.)

[**Testimony of W. J. Dougherty, for Defendant.**]

W. J. DOUGHERTY, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. QUICK.)

I was employed as a brakeman on the train at the time of the accident at McMillin. I have been in the train service for about twenty years and off and on for about fifteen years have been handling trains that haul logs, and I am familiar with the customary way of loading logs for transportation by rail. I examined these logs when we picked them up at the spur and they were loaded in the ordinary way and appeared to be safely loaded. When we find a car that is not properly loaded, we set it back to be re-loaded by the logging company. The railway company has nothing to do with the loading of the car. I again looked these cars over at Orting and they appeared to be in the same condition as when we picked them up. The train was going about fifteen miles an hour at the time of the accident.

Cross-examination.

(By Mr. GORDON.)

Q. How long were you in Crocker that day?

A. Just long enough to get orders to run from Crocker to Orting.

Q. Not being a carded train you were running on orders? A. Yes, sir.

Q. About how long did you have to wait?

(Testimony of W. J. Dougherty.)

A. About, probably, thirty minutes I would judge.

Q. You stopped at Orting and did switching there? A. Yes, sir.

Q. How long did you stop at Orting?

A. Probably about 45 minutes.

Q. Do you know about what time you left Orting?

A. It was close to 12 o'clock; about 12, I would say.

Q. What was your next stop under your running orders? A. At Meeker Junction.

(Witness excused.)

Defendant rests.

[Recital Re] Motion of Defendant for Directed Verdict.

At the close of all the evidence in the case, defendant moved the Court to instruct the jury to return a verdict in favor of the defendant, for the reason that the plaintiff is not entitled to recover judgment against the defendant under all the evidence in the case, and for the further reason the evidence affirmatively shows that the plaintiff was not a passenger at the time of his injury.

Which motion was by the Court overruled, to which ruling of the Court defendant excepted, which exception was by the Court allowed.

Whereupon, after argument of the case to the jury by the respective counsel, the Court charged the jury as follows, to wit:

Charge to the Jury.

Gentlemen of the Jury:

The occurrence which gives rise to this controversy was in the month of May of the present year at a place called McMillin, in Pierce County, in this State.

It is admitted that at that time the defendant company operated a railroad line extending through McMillin.

The plaintiff bases his right to recover compensation in this case upon the fact that he was in this building which has sometimes been called a waiting-room and sometimes a station, I think, for the purpose of taking passage as a passenger upon the next southbound train. That is one of the important allegations in the complaint and the truthfulness or want of truthfulness of that allegation is one of the important questions in the case. If you find that the plaintiff was in the station, in the building, whatever it may be called, and that that building was provided by the company as the waiting-room for intending passengers, and if the plaintiff was in that building with the intention of taking passage upon the next train, then if certain other circumstances concur, which I will state in a moment, he would be entitled to the rights of a passenger, but if you find that he was in that building for some other purpose, not with the *bona fide* intention of taking the next train south bound as he alleges, but for some purpose foreign to that, for instance if he was there merely to rest or preparatory to walking upon the right of way of

the company to some other point, or for any other purpose other than that of an intending passenger upon the next train of the company, then your verdict would be for the defendant regardless of any other fact in the case. That is the cause of action that the complaint alleges. There is no question here of what degree of care the defendant company would owe to a licensee or trespasser, because that is not the case we are trying. The first question, therefore, for you to determine, is with what intention was the plaintiff within the building at the time of the occurrence in question. If he was in the building with the intention of taking passage upon the next train, were the circumstances such that he was entitled at the time to the rights of a passenger in that building; I say, were the circumstances such that this conclusion followed. In order to constitute one a passenger, he must go to the place provided by the carrier,—in this case the railroad company,—for the reception of passengers, and in such a case he is entitled to the use of the station facilities for a reasonable time before the departure of the train in which he intends to take passage. During such reasonable time he is a passenger to all intents and purposes, and entitled to the rights of a passenger. One question, therefore, perhaps the next important question that you have to pass upon, is, was he there within a reasonable time; that is, was the time at which he was there a reasonable time for a *bona fide* intending passenger to be there before the departure of the next train. It is not the policy of the law to require railroad companies to maintain their sta-

tion facilities for the benefit of persons who at some future time expect to become passengers; there must be some limit as to the right of a person to use a station with the obligations, or rather with the rights, of a passenger. Now, the law does not fix that limit by any number of minutes or any number of hours or in any other way, it says a reasonable time. What is a reasonable time is a question in this case of fact for you to determine. It depends upon the circumstances of the case. The circumstances here are more or less contested. I will not undertake to state the circumstances *pro* and *con*. They have been argued by counsel and appear in the evidence. It is for you to say under all those circumstances whether at the time of the occurrence it was a reasonable time for the plaintiff to be there intending to take passage upon the next train. If he was there more than a reasonable time before the departure of the next train, then he would not be entitled to the rights of a passenger and your verdict would be for the defendant. Of course the fact that he had been there beyond a reasonable time would not of itself cut any figure. The question is at the time of the occurrence, taking all the facts and circumstances into consideration, and the time of the departure of the next train, was he within the reasonable time when the occurrence happened.

The rule of care, the degree of care which the law imposes upon carriers of passengers is a higher degree of care than that which is imposed in the ordinary transactions of life. If you find that the plaintiff was entitled to the rights of a passenger at the

time of this occurrence, then it becomes important for you to consider whether the defendant was negligent within the rules of law applicable to passengers, and whether the negligence of the defendant caused injury to the plaintiff, because in order for the plaintiff to recover, it must appear that he was entitled to the rights of a passenger, and that the defendant was negligent within the rule applicable to passengers, and that that negligence caused the injury of the plaintiff.

Where a passenger is carried on the line of a railroad and if he is entitled to the rights of a passenger, the rule is the same. The rule requires the carrier to exercise the utmost care so far as human skill and foresight can go with respect to the cars and other appliances on which the safety of the passengers depend, and if by reason of the slightest negligence in this respect on the part of the carrier the passenger is injured, the carrier will be liable. The carrier is bound to exercise the strictest vigilance in receiving a passenger and conveying him to his destination, and setting him down safely which the means of conveyance employed under the circumstances of the case will permit. The degree of care required of the carrier is not the utmost and highest absolutely, but the highest which is consistent with the nature of the carrier's business, having due regard to the necessary requirements of the business on the one hand, and the necessary requirements for the safety of passengers on the other hand. Applying that rule, if the plaintiff was entitled to the rights of a passenger, does the case show negligence on the

part of the defendant.

If you should find that the plaintiff being in the waiting-room and entitled to the rights of a passenger, was struck either by a log or by portions of the building and that the occurrence was caused by the falling of a log off of one of the passing trains of the defendant company, then that fact would be *prima facie* evidence of negligence on the part of the defendant, because usually when trains are operated with ordinary care, such occurrences do not happen and such an occurrence unexplained would be sufficient evidence of negligence of the defendant, so that if that negligence was the cause of the plaintiff's injury, he would be entitled to recover; but the burden is upon the plaintiff on the whole case to prove by a preponderance of the evidence the negligence of the defendant. You have heard the evidence as to how the accident did occur, as to the various steps, acts and conduct of the various employees of the defendant, and all the facts and circumstances, and it is for you to say whether upon all the evidence in the case the plaintiff has shown by a preponderance of the evidence the negligence of the defendant and that that negligence caused the injury to the plaintiff.

Thereupon the jury having received the charge of the Court, retired to consider their verdict.

[Recital Re] Verdict.

Thereafter the jury returned into open court with a verdict in favor of the plaintiff for damages against the defendant in the sum of \$3,000.00.

Now, in the furtherance of justice and that right may be done, the defendant presents the foregoing

as its bill of exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the judge as provided by law and filed as a bill of exceptions.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Defendant.

[Admission of Service of Bill of Exceptions.]

Service of the foregoing bill of exceptions and receipt of copy thereof is hereby acknowledged this 14th day of December, 1910.

DAVID & WESTCOTT,
J. H. EASTERDAY,
GORDON & ASKREN,
Attorneys for Plaintiff.

[Endorsed.]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

Now, on this 19th day of December, 1910, the above cause coming on for hearing on the application of the defendant to settle the bill of exceptions in said cause, defendant appearing by J. W. Quick, its attorney, and the plaintiff appearing by Gordon & Askren, his attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by law and that no amendments have been suggested thereto and that counsel for plaintiff have no amendments to propose, and that

both parties consent to the signing and settling of the same, and that the time for settling said bill of exceptions has not expired; and it further appearing to the Court that said bill of exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto and all the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions and the clerk of this court is hereby ordered and instructed to attached the same thereto;

Therefore, upon motion of J. W. Quick, Esquire, attorney for defendant, it is hereby

ORDERED that said proposed bill of exceptions be and the same is hereby settled as a true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct bill of exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of the Appeals for the Ninth Circuit.

GEORGE DONWORTH,
Judge.

[Endorsed.]

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant, Northern Pacific Railway Company, and files the following assignment of errors upon which it will rely upon its prosecu-

tion of its writ of error in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause.

I.

The Honorable Circuit Court erred in overruling the motion made by the defendant for a nonsuit at the close of plaintiff's case. To which ruling of the Court defendant excepted, which exception was allowed by the Court.

II.

The Court erred in overruling the motion of the defendant, at the close of all the evidence in the case, to instruct the jury to return a verdict in favor of the defendant, for the reason that the plaintiff was not entitled to recover judgment against the defendant under the evidence.

III.

That the Court erred in admitting incompetent and immaterial evidence over the objection of the defendant, which evidence was prejudicial to defendant and was introduced by the plaintiff for the purpose of proving that the plaintiff had the necessary money with which to pay his fare as a passenger on defendant's train, which evidence consisted of receipts for postoffice money orders for money sent by the plaintiff to his wife in Austria many months prior to the time of the accident, as shown by Plaintiff's Exhibits "D," "E" and "F," set forth in the following evidence:

Q. "How do you send money home when you send it? A. Through the postoffice.

Q. Have you the receipts for any money?

A. Yes.

Q. Where are they? A. In my pocket.

Q. Here? A. Yes, sir.

Mr. QUICK.—I would object to any offer of that as incompetent and immaterial.

The COURT.—Objection overruled; exception allowed.

Mr. GORDON.—I show you Plaintiff's Exhibits 'D,' 'E' and 'F,' did you ever see these before?

A. Yes.

Q. Where did you get them; did you ever have them? A. I got them at Carbonado.

Q. Did you pay money for these? A. Sure.

Q. Where were you sending the money represented by them? A. Home.

Q. To your wife?

A. To my partner; and he gave to my wife.

Mr. GORDON.—We make the offer of these Exhibits 'D,' 'E' and 'F' as evidence.

Mr. QUICK.—Objected to as immaterial.

The COURT.—Objection overruled; exception allowed.

Whereupon said receipts were received in evidence and marked as Plaintiff's Exhibits 'D,' 'E' and 'F,' respectively."

And in permitting plaintiff to testify over the objection of the defendant concerning receipts for post-office money orders which had been burned and which were for money sent to the old country many months prior to the date of the accident, as shown by the following evidence:

“Q. Did you lose any papers in a fire, and if so, when and where?

A. I lost some in a boarding-house in California.

Q. How long ago? A. Last year.

Q. What kind of papers?

Mr. QUICK.—We object to this.

The COURT.—Objection overruled; exception allowed.

A. Money order for postoffice papers, for the old country.

Mr. GORDON.—I want to show receipts for money forwarded by postoffice orders, of later dates than those already offered, were burned, with his naturalization papers.

Mr. QUICK.—We object as immaterial and incompetent.

The COURT.—Objection overruled; exception allowed.

A. They were postoffice money orders.”

Wherefore, defendant, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington, Western Division, rendered in the above-entitled cause, be reversed, and that such directions be given that full force and efficiency may inure to defendant by reason of its defense to said cause.

GEO. T. REID,

J. W. QUICK,

L. B. Da PONTE,

Attorneys for Defendant.

[Endorsed.]

[Endorsed]: No. 1934. United States Circuit Court of Appeals for the Ninth Circuit. The Northern Pacific Railway Company (a Corporation), Plaintiff in Error, vs. John Marinovich, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Western Division. Filed January 3, 1911.

F. D. MONCKTON,
Clerk.

